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2 **NOT FOR CITATION**

3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6
7 SHAWN ALLS,

8 Plaintiff, No. C 05-0901 PJH (PR)

9 v.

10 M. FRIEDMAN, M.D.; J. WOODFORD,
11 Director, CDCR; DR. AUNY; DR. LUCA;
DR. FREDERICK,

12 Defendants. / **ORDER GRANTING IN PART
13**
14 AND DENYING IN PART
15 DEFENDANTS' MOTION TO
16 DISMISS

17 This is a civil rights case filed pro se by a state prisoner. Plaintiff contends that
18 defendants were deliberately indifferent to a serious medical need. Before the court for
ruling is defendants' unenumerated motion to dismiss in which they contend that plaintiff
failed to exhaust his administrative remedies and that his supplemental state law claims are
barred because his tort claim was untimely. The motion is unopposed.

19 **DISCUSSION**

20 1. *Defendants' claim that plaintiff has failed to exhaust*

21 Section 1997e of title 42 of the United States Code provides that "[n]o action shall be
22 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal
23 law, by a prisoner confined in any jail, prison, or other correctional facility until such
24 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Although
25 once within the discretion of the district court, exhaustion in prisoner cases covered by §
26 1997e(a) is now mandatory. *Porter v Nussle*, 122 S. Ct. 983, 988 (2002). All available
27 remedies must now be exhausted; those remedies "need not meet federal standards, nor
28 must they be 'plain, speedy, and effective.'" *Id.* (citation omitted). Even when the prisoner

1 seeks relief not available in grievance proceedings, notably money damages, exhaustion is
2 a prerequisite to suit. *Id.*; *Booth v Churner*, 532 U.S. 731, 741 (2001). Similarly,
3 exhaustion is a prerequisite to all inmate suits about prison life, whether they involve
4 general circumstances or particular episodes, and whether they allege excessive force or
5 some other wrong. *Porter*, 122 S. Ct. at 992.

6 The State of California provides its inmates and parolees the right to appeal
7 administratively "any departmental decision, action, condition or policy perceived by those
8 individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). It
9 also provides its inmates the right to file administrative appeals alleging misconduct by
10 correctional officers. See *id.* § 3084.1(e). In order to exhaust available administrative
11 remedies within this system, a prisoner must proceed through several levels of appeal: (1)
12 informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second
13 level appeal to the institution head or designee, and (4) third level appeal to the Director of
14 the California Department of Corrections. See *id.* § 3084.5; *Barry v. Ratelle*, 985 F. Supp.
15 1235, 1237 (S.D. Cal. 1997). A final decision at the director's level satisfied the exhaustion
16 requirement under § 1997e(a). *Id.* at 1237-38.

17 Nonexhaustion under § 1997e(a) is an affirmative defense. *Jones v. Bock*,
18 127 S. Ct. 910, 919 (2007); *Wyatt v Terhune*, 315 F.3d 1108, 1119 (9th Cir 2003). It
19 should be treated as a matter of abatement and brought in an "unenumerated Rule 12(b)
20 motion rather than [in] a motion for summary judgment." *Id.* (citations omitted). In deciding
21 a motion to dismiss for failure to exhaust administrative remedies under § 1997e(a), the
22 court may look beyond the pleadings and decide disputed issues of fact. *Id.* at 1119-20.

23 If the court concludes that the prisoner has not exhausted California's prison
24 administrative process as to any of the viable claims in the complaint, the proper remedy is
25 dismissal without prejudice. *Id.* at 1120. The PLRA does not require dismissal of the entire
26 complaint when a prisoner has failed to exhaust some, but not all, of the claims included in
27 the complaint, however. *Jones v. Bock*, 127 S. Ct. at 925-26 (rejecting "total exhaustion-
28 dismissal" rule); *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005) (same).

1 The proper treatment of a mixed complaint, i.e., a complaint with both exhausted and
2 unexhausted claims, will depend on the relatedness of the claims contained within. *Id.* at
3 1175. When a prisoner has filed a mixed complaint and wishes to proceed with only the
4 exhausted claims, the district court should simply dismiss the unexhausted claims when the
5 unexhausted claims are not intertwined with the properly exhausted claims. *Id.* On the
6 other hand, when a plaintiff's mixed complaint includes exhausted and unexhausted claims
7 that are closely related and difficult to untangle, dismissal of the defective complaint with
8 leave to amend to allege only fully exhausted claims, is the proper approach. *Id.* at 1176.

9 Compliance with prison grievance procedures is all that is required by the PLRA to
10 properly exhaust, so the level of detail necessary in a grievance to comply with the
11 grievance procedures will vary from system to system and claim to claim, but it is the
12 prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.
13 *Jones*, 127 S. Ct. at 923. In California, the regulations permit an administrative appeal to
14 be filed as to "any departmental decision, action, condition, or policy which they can
15 demonstrate as having an adverse effect upon their welfare." Cal. Code Regs. tit. 15,
16 § 3084.1(a)." As to content, the regulations only instruct the prisoner to "describe the
17 problem and action requested... ." *Id.* at § 3084.2(a). It is not necessary that every person
18 sued have been named in the grievance. *Jones*, 127 S.Ct. at 923.

19 Because defendant's motion is supported by a declaration from the Chief of the
20 Inmate Appeals Branch and exhibits showing what grievances were filed, and because
21 plaintiff has chosen not to argue to the contrary, the court adopts defendants' contention
22 that the only grievance in which plaintiff raised these claims was log number 03-01423.
23 The issue, then, is to what extent this grievance sufficed to exhaust the claims in this case.

24 This is how the court described the allegations of the complaint in the initial review
25 order:

26 In 2002, plaintiff had the fungus disease valley fever, though he did not
27 know it. He suffered from chest pain, dry cough, headaches, fever, weight
28 loss, loss of strength, and aching bones. He was taken to the infirmary when
he passed out; defendant Dr. Aung ordered an x-ray, which showed no
problem, and prescribed antibiotics, antihistamines and Tylenol, allegedly as

1 treatment for a cold. Plaintiff's condition worsened. He began vomiting,
2 allegedly as a result of the antibiotics. He asserts that Dr. Aung's decision to
3 take the easier course of treating plaintiff's medical problem as a cold, rather
4 than investigating further, was influenced by a state budget crisis, which had
5 resulted in pressure to cut costs. This is sufficient to allow the federal and
6 state claims against Dr. Aung to proceed.

7 On October 31, 2002, plaintiff saw defendant Dr. Luca. He vomited
8 several times in the course of the examination. Dr. Luca sent him to an
9 outside hospital. At the hospital a tear in his "chest tissue" was found and
10 blood in his urine, but apparently valley fever was not diagnosed. When he
11 returned to the prison Dr. Luca found that he was running a high fever and
12 committed him to the infirmary for three days. On November 21, 2002, Dr.
13 Luca diagnosed valley fever and began treatment. After two months Dr. Luca
14 took him off the treatment, despite his pleas that he still had symptoms.
15 Plaintiff asserts that the lack of proper care, and in particular Dr. Luca's taking
16 him off treatment too soon, was caused by the budget crisis. These
17 allegations are sufficient to allow the federal and state claims against Dr. Luca
18 to proceed.

19 [Plaintiff's claims against defendant Dr. Frederick are omitted
20 because they have been dismissed.]

21 Plaintiff asserts that defendants Woodford, the Director of the CDC,
22 and Dr. Friedman, the Chief Medical Officer at the prison, were responsible
23 for the lack of adequate provision for medical care caused by their response
24 to the budget crisis. This is sufficient to state a claim against them.

25 The claims can be summarized as being that Dr. Aung failed to properly diagnose
26 his illness and initially treated it as a cold, in part because of budget considerations; Dr.
27 Luca ended treatment prematurely because of budget considerations and against plaintiff's
28 protests; and Woodford and Friedman failed to provide the prison with a system to deliver
proper care because of budget considerations.

29 The complaint and the grievance are quite similar, down to identical language in
30 some places, but notably missing from the grievance is any contention that the poor care
31 was because of budget considerations or a defective health care program. Plaintiff's claims
32 against Woodford and Friedman therefore are not exhausted. Because these claims are
33 not intertwined with those against the other defendants, they can be dismissed by the court
34 without requiring plaintiff to amend. See *Lira*, 427 F.3d at 1176.

35 The claims against Dr. Aung and Dr. Luca, however, are exhausted, and will not be
36 dismissed on this ground.

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2. *Claim by defendants Aung and Woodford that due process claim is unexhausted*

3 Defendants Aung and Woodford read the amended complaint to contain an attempt
4 by plaintiff to state a claim that they violated a purported due process right to "safety," in
5 addition to his Eighth Amendment right not to be subjected to deliberate indifference to a
6 serious medical need, and allege that this claim is not exhausted. Although Aung and
7 Woodford interpret this contention as going only to them, the court's reading is that plaintiff
8 asserts this claim against all defendants. Pet, handwritten addendum at 4.

9 Aung and Woodford allege that this claim has not been exhausted, as it is not
10 mentioned in the grievance. The court concludes that it is not necessary to allege legal
11 theories in order to exhaust in the California prison system. As noted above, the terms of
12 the state's grievance system control what must be alleged in order to exhaust, see *Jones*,
13 127 S. Ct. at 923, and California's requirement that the prisoner describe "the problem"
14 does not require legal allegations. Because plaintiff provided the facts of his "problem," he
15 has exhausted his contention that the doctors did not give him proper medical treatment,
16 which is sufficient to exhaust any federal claim arising directly from that problem, whatever
17 the theory of recovery.¹

3. *State law claims*

19 Defendants assert that the court lacks subject matter jurisdiction to consider
20 plaintiff's state law claims for medical malpractice and negligence because his tort claim
21 was untimely and because he did not exhaust his administrative remedies.

22 The court grants defendants' request to take judicial notice of the proffered
23 documents, a request for all medical care claims made by plaintiff since October of 2000, a
24 copy of his tort claim that was rejected as untimely, and a certification by the custodian of

25 ¹ The grievance did not describe the "problem" that lies at the heart of plaintiff's
26 claims against Woodford and Friedman, in that it did not contain any factual claim that they
27 instituted a policy and that the policy was defective to such a degree as to cause a violation
28 of plaintiff's rights. It simply was not a "this prison has an inadequate medical care program" grievance. That is why the court has concluded in the section above that plaintiff did not exhaust his claims against Woodford and Friedman.

1 records that the other two documents are true and correct copies. See *United States v.*
2 *Ritchie*, 342 F.3d 903, 908 (9th Cir.2003) (on a motion to dismiss the court may consider
3 documents attached to complaint, documents incorporated by reference into complaint, or
4 matters of judicial notice, without converting the motion to dismiss into motion for summary
5 judgment). Because plaintiff has not opposed the motion there is nothing to the contrary in
6 the record.

7 Before a state law claim can be brought, whether in state or federal court, the
8 California Tort Claims Act ("CTCA") requires that the claim be presented to the Victim
9 Compensation and Government Claims Board. See Cal. Gov. Code §§ 911.2, 945.4;
10 *Hernandez v. McClanahan*, 996 F.Supp. 975, 977 (N.D.Cal. 1998) (failure to present timely
11 California tort claims bars plaintiff from bringing them in federal suit). The Ninth Circuit has
12 ruled that these procedural requirements (and compliance with them) are "substantive
13 elements of the cause of action." See *United States v. State of California*, 655 F.2d 914,
14 918 (9th Cir.1980). It is proper for federal courts to determine whether a plaintiff bringing
15 tort claims against a public entity has complied with the CTCA. See *United States v. State*
16 *of California*, 655 F.2d at 918-19; *Hernandez*, 996 F.Supp. 975 at 979; *Boxall v. Sequoia*
17 *Union High Sch. Dist.*, 464 F.Supp. 1104, 1113 (N.D. Cal. 1979).

18 Defendants have established that plaintiff's tort claim was untimely. The state law
19 claims will be dismissed.

20 **CONCLUSION**

21 The motion to dismiss (document number 9 on the docket) is **GRANTED IN PART**
22 **AND DENIED IN PART**. It is **GRANTED** as to all of plaintiff's claims against Woodford and
23 Friedman, state and federal, and as to his state law claims against the other defendants. It
24 is **DENIED** as to plaintiff's federal constitutional claims against defendants Aung and Luca.

25 **IT IS SO ORDERED.**

26
27 Dated: March 15, 2007.

28 G:\PRO-SE\PJH\CR.05\ALLS901.EXH


PHYLLIS J. HAMILTON
United States District Judge